constitutions and the separation of powers. To say, as Justice Field implies, that the legislative regulation of judicial procedure is dependent for its effectiveness upon the acquiescence of the courts would belie the historical facts. Equally vulnerable is the statement that the courts may regulate their procedure only by permission of legislatures. The orbits of legislative and judicial regulation of procedure are distinct and they must be determined primarily by historical criteria. Clearly the courts may disregard any legislative interference with what they have habitually regulated from earliest days. In that category are such matters as admission to the bar, disbarment, and the details of procedure of which the principal case is an illustration. Logically the legislature, then, should have the right to regulate those matters of procedure which it habitually regulated. But the doctrine of the separation of powers imposes restrictions upon this legislative right. The judiciary is an independent coördinate department. Consequently, the legislature would stray from its orbit were it to provide for anything which either abridged the general power of the courts to administer justice or which substantially hampered the court in its functions.[20] Regulation of the court's power over contempt would be an illustration of the former class. Legislative limitation of the time [21] given to counsel for argument may well be regarded as an illustration of the latter class.

CONSTITUTIONALITY OF THE NEW YORK EMERGENCY HOUSING LAWS.—The general cessation of building operations during the recent war has inevitably resulted in an acute shortage of housing accomodations, especially in the larger cities.[1] In several foreign countries it has been found necessary to take legislative action to prevent profiteering landlords from taking advantage of this situation.[2] The first legislation of this kind in the United States was the Ball Rent Law,[3] regulating rents in the District of Columbia, which has recently been declared unconstitutional.[4] The most important housing legislation, however, has been that of the state of New York, which was enacted to avert a threatened

[20] Dorsey *v.* Dorsey, 37 Md. 64 (1872) (held that it was incompetent for the legislature to authorize the courts to reopen and rehear cases previously decided); Burt *v.* Williams, 24 Ark. 91 (1863) (granting of a continuance pending case was the exercise of judicial authority and a legislative act assuming to do this was void); De Chastellux *v.* Fairchild, 15 Pa. St. 18 (1850) (legislative enactment compelling courts to grant a new trial is null).

[21] Cobb Chocolate Co. *v.* Knudson, 207 Ill. 452, 69 N. E. 816 (1904); Reagan *v.* St. Louis Transit Co., 180 Mo. 117, 79 S. W. 435 (1904). See THOMPSON, TRIALS, § 924.

[1] See Edward L. Schaub, "Regulation of Rentals during the War Period," 28 JOURN. POL. ECON. 1.

[2] Such action has been taken in England. See INCREASE OF RENT AND MORTGAGE INTEREST ACT, 5 & 6 GEO. V, c. 97, amended by 9 GEO. V, c. 7. In Newfoundland, see TENANTS' ACT of June 5, 1919, c. 10. And in New Zealand, see LANDLORD AND TENANT ACT, 10 GEO. V, No. 32, 104. As to similar statutes in continental Europe, see Edward L. Schaub, "Regulation of Rentals during the War Period," *supra*.

[3] See 41 STAT. AT L. 298.

[4] Hirsch *v.* Block, 267 Fed. (D. C.) 614 (1920). The decision went on the grounds that the statute deprived the landlords of property without due process of law, and that it took away the right to trial by jury. The chief justice dissented.

housing crisis in New York City.[5] In brief, the New York legislation now in force provides that unreasonable rents cannot be recovered by legal action,[6] and suspends entirely all remedies whereby a landlord may recover possession of his property,[7] except in certain specified cases.[8] The legislation applies only to buildings occupied for dwelling purposes, and is to remain in force until October 1, 1922. It has been upheld as constitutional by the Federal District Court for the Southern District of New York[9] and by the Appellate Division for the Second Department.[10] The Appellate Division for the First Department, however, has held the legislation invalid, so far as it deprives landlords of all remedies for recovering possession of their property.[11]

Four principal constitutional objections may be made to the laws: first, that they deny to the landlords the equal protection of the laws;[12] second, that they deprive the landlords of property without due process of law;[13] third, that they interfere with freedom of contract;[14] fourth, that they impair the obligation of contracts.[15]

The first objection seems untenable. It is well settled that the state legislatures may make classifications of persons for the purpose of dealing differently with each class without violating any constitutional

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[5] The situation first became acute last spring. See REPORT OF THE HOUSING COMMITTEE OF THE RECONSTRUCTION COMMISSION OF THE STATE OF NEW YORK of Mar. 22, 1920, 2–3 10–11. To meet the situation the legislature in April passed laws which prevented the recovery by legal action of unreasonable rents and authorized the granting of stays of execution in dispossess proceedings and actions of ejectment. See 1920 N. Y. LAWS, c. 130–139. These laws were to remain in force until October 1, 1920. It was hoped that the laws would no longer be necessary by that time, but this hope proved to be a vain one. See REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON HOUSING, of Sept. 20, 1920, 5–6. Hence further legislation was necessary to avert a serious situation when the April laws ceased to be in force. See 1920 N. Y. LAWS, c. 942–953. This legislation became effective September 22, 1920.

[6] See 1920 N. Y. LAWS, c. 944, amending c. 136 of the April laws.

[7] See 1920 N. Y. LAWS, c. 942 (suspending summary dispossess proceedings for nonpayment of rent), 945 (suspending similar proceedings to evict tenants holding over after the expiration of their terms) and 947 (suspending the action of ejectment).

[8] These are (a) where the tenant is objectionable, (b) where the landlord, being a natural person, desires the premises for his own personal use, (c) where the landlord desires to construct a new building on the site of the old one, (d) where the building has been sold to a coöperative apartment company.

[9] Brown Holding Co. *v.* Feldman, N. Y. Law Journal, Dec. 20, 1920.

[10] People *ex rel.* Rayland Realty Co. *v.* Fagan, N. Y. Law Journal, Dec. 9, 1920. One justice dissented, and two concurred in the result only, on a procedural ground.

[11] Guttag *v.* Shatzkin, N. Y. Law Journal, Dec. 28, 1920. One justice dissented. The same court has held constitutional the provision of the laws which prevents the recovery of unreasonable rents. Levy Leasing Co. *v.* Siegel, N. Y. Law Journal, Dec. 30, 1920.

[12] See U. S. CONSTITUTION, Fourteenth Amendment, ". . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

[13] See U. S. CONSTITUTION, Fourteenth Amendment, ". . . nor shall state deprive any person of life, liberty, or property, without due process of law." See also N. Y. CONSTITUTION, Art. I, Sec. 6, "No person . . . shall be deprived of life, liberty or property without due process of law."

[14] Freedom of contract is protected by the Fourteenth Amendment. Lochner *v.* New York, 198 U. S. 45 (1905).

[15] See U. S. CONSTITUTION, Art. I, Sec. 10, "No state shall . . . pass any . . . law impairing the obligation of contracts."

guarantee, provided only that such classification is reasonable.[16] The classification made by the New York laws seems reasonable; certainly it is not so outrageous as to be unconstitutional.[17]

The second and third objections to the laws are based upon the Fourteenth Amendment and the analogous provision in the constitution of the state.[18] It has been recognized, however, since the decision in the *Slaughter-House Cases*,[19] that the requirement of due process does not limit the police power of the states.[20] Although the precise scope of the police power has never been exactly defined,[21] a wide discretion has been left to the state legislatures, and if the legislative power is "put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion to be greatly and immediately necessary to the public welfare," [22] the courts will be very slow to declare such action unconstitutional. Thus, laws regulating hours of labor in mines,[23] compelling banks to contribute to a guarantee fund,[24] prohibiting the use of trading stamps,[25] regulating insurance rates,[26] or providing for the regulating of prices of the necessities of life,[27] have been upheld. The New York housing legislation seems no more radical, and so would appear to be within the scope of the police power.[28] Hence unless it is arbitrary and has no reasonable tendency to attain the end sought, it is constitutional.[29] Neither objection applies here. It should be noted that the laws ensure to the landlord prompt payment of a reasonable compensation for the use of his property.[30] On the whole, it would seem, then, that this legislation is not a denial of due process.

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[16] Hayes *v.* Missouri, 120 U. S. 68 (1886); Budd *v.* New York, 143 U. S. 517 (1891); Lindley *v.* National Carbonic Gas Co., 220 U. S. 61 (1911); Rast *v.* Van Deman & Lewis, 240 U. S. 342 (1916).

[17] A given legislative classification will not be declared unconstitutional unless under no possible state of facts could it be a reasonable one. St. Louis Co. *v.* Illinois, 185 U. S. 203 (1902); Wilson *v.* New, 243 U. S. 332 (1917). And classifications similar to that here in question have been sustained. See Welsh *v.* Swasey, 214 U. S. 91 (1909); Cusack & Co. *v.* Chicago, 242 U. S. 526 (1916). Bailey *v.* People, 190 Ill. 28, 60 N. E. 98 (1901), *contra*.

[18] See notes 13 and 14, *supra*.

[19] 16 Wall. (U. S.) 36 (1873).

[20] Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129 (1874); Mugler *v.* Kansas, 123 U. S. 623 (1887); Lawton *v.* Steele, 152 U. S. 133 (1894); Camfield *v.* United States, 167 U. S. 518 (1897); Noble State Bank *v.* Haskell, 219 U. S. 104 (1911); Jeffery Mfg. Co. *v.* Blagg, 235 U. S. 571 (1915).

[21] See George W. Wickersham, "The Police Power — A Product of the Rule of Reason," 27 HARV. L. REV. 297.

[22] Holmes, J., in Noble State Bank *v.* Haskell, *supra*, 111. See also Chicago Ry. *v.* Drainage Commissioners, 200 U. S. 561, 592 (1905).

[23] Holden *v.* Hardy, 169 U. S. 366 (1898).

[24] Noble State Bank *v.* Haskell, *supra*.

[25] Rast *v.* Van Deman & Lewis, *supra;* Tanner *v.* Little, 240 U. S. 369 (1916).

[26] German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389 (1914).

[27] American Coal Mining Co. *v.* Special Commission, U. S. Dist. Court for the Dist. of Indiana, decided Sept. 16, 1920 (not yet reported). The apparently contrary decision in Holter Hardware Co. *v.* Boyle, 263 Fed. 134 (1920), is distinguishable on the ground that the statute there involved regulated prices of all commodities. Even on that basis, however, it is open to criticism. See 33 HARV. L. REV. 838.

[28] The legislation might well be upheld on the ground that it was necessary to protect the public health and the public morals. See 9 DEPT. OF HEALTH BULLETIN, N. Y. CITY, N. S., No. 42; REPORT OF THE HOUSING COMMITTEE OF THE RECONSTRUCTION COMMISSION OF THE STATE OF NEW YORK, of Mar. 22, 1920, 15.

[29] Lawton *v.* Steele, *supra;* Chicago Ry. *v.* Drainage Commissioners, *supra*.

[30] See 1920 N. Y. LAWS, c. 942, 944, 945, 947.

A fourth question remains, however. Do the laws impair the obligation of contracts? It is clear that so far as they apply to leases made subsequent to their enactment, they are not objectionable on this ground.[31] As the provision that no rent can be recovered unless it is reasonable is not retroactive,[32] it is clearly valid. A different question arises as to the provisions that suspend all remedies for the recovery of possession from tenants holding over after the expiration of their terms, as applied to leases made prior to the enactment of the laws.

The ordinary lease contains a covenant by the tenant "quietly to quit and deliver up possession of the premises" at the end of his term.[33] The New York laws deprive the landlord of all power to enforce this covenant for a period of two years.[34] It is well settled that a total deprivation [35] or a material impairment of the effectiveness of the legal remedy for the breach of a contract impairs the obligation of the contract.[36] It is difficult to see how a complete suspension of all remedy for two years can fail to be a material impairment.[37]

It seems, then, that the New York housing laws, as applied to prior leases, impair the obligation of contracts. Can they be sustained under the police power? There is some language in the reports which would seem to indicate that the contract clause is subject to such an implied exception.[38] The cases, however, fail to support this conclusion.[39]

[31] See Ogden *v.* Saunders, 12 Wheat. (U. S.) 213 (1827); Denny *v.* Bennett, 128 U. S. 489 (1888).

[32] 78th Street & Broadway Co. *v.* Rosenbaum, 111 Misc. (N. Y.) 577 (1920); Paterno Investing Co. *v.* Katz, 112 Misc. (N. Y.) 242 (1920). Both cases involve c. 136 of the April laws, but as the wording of c. 944 is identical on this point, the same construction should govern.

[33] See OLIVER, PRACTICAL CONVEYANCING, 4 ed., 229; 2 MCADAM, LANDLORD AND TENANT, 4 ed., 1660.

[34] See note 7, *supra*. The landlord cannot maintain a bill in equity for specific performance of the covenant to quit the premises. Brandt & Co. *v.* Weil, N. Y. Law Journal, Nov. 1, 1920. And to allow an action for damages for the breach of the covenant would be contrary to the policy of the emergency housing laws.

[35] White *v.* Hart, 13 Wall. (U. S.) 646 (1872).

[36] Green *v.* Biddle, 8 Wheat. (U. S.) 1 (1823); Brown *v.* Kinzie, 1 How. (U. S.) 311 (1843); Hawthorne *v.* Calef, 2 Wall. (U. S.) 10 (1865); Gunn *v.* Barry, 15 Wall. (U. S.) 610 (1873). But a reasonable alteration of the remedy, which does not materially impair it, is constitutional. Hawkins *v.* Barney, 5 Pet. (U. S.) 451 (1831) (change in the statute of limitations); Penniman's Case, 103 U. S. 714 (1881) (abolition of imprisonment for debt).

[37] Statutes suspending all actions against persons absent in the military service of the United States in time of war have been upheld. Edmonson *v.* Ferguson, 11 Mo. 344 (1846); Breitenbach *v.* Bush, 44 Pa. St. 313 (1862); Hoffman *v.* Charlestown Five Cent Savings Bank, 231 Mass. 324, 121 N. E. 15 (1918). But such statutes are very different from those under consideration here, as they were passed by Congress under the war power, and were necessary to protect the interests of absent defendants.

[38] See Legal Tender Cases, 12 Wall. (U. S.) 457, 551 (1870); Manigault *v.* Springs, 199 U. S. 473, 480 (1905); Hudson Co. *v.* McCarter, 209 U. S. 349, 357 (1908); Atlantic Transportation Co. *v.* Goldsboro, 232 U. S. 548, 556 (1913).

[39] It must be admitted that the view that the contract clause is subject to the police power is apparently supported by the case of Manigault *v.* Springs, *supra*. It is believed, however, that this case in reality stands on a different ground. There plaintiff and defendant were riparian owners on a certain creek. Defendant built a dam which overflowed plaintiff's land. Plaintiff protested, but later agreed to allow the dam to remain for a certain period, if defendant would agree to keep the creek open permanently thereafter. The dam was removed, and the contract to keep the creek open carried out for several years, when the state legislature by special act

Where a law apparently impairing the obligation of a contract has been upheld under the police power, the contract alleged to have been impaired seems to have been either that of a state purporting to bargain away part of the sovereign power,[40] or that of a public utility, in derogation of its common law duty to render a reasonable service to all.[41] It is well settled that a state has no power to bargain away its sovereignty, and any attempt to do so will be void.[42] Similarly a special contract of a public utility made in derogation of its fundamental legal duty to render a reasonable service at reasonable rates is invalid or at least voidable.[43] Where, however, the contract in question is an ordinary private contract, valid when made, it would seem to be going counter to the plain words of the Constitution to hold that a state, even in the exercise of the police power, could impair it.

It may be true that a general law which incidentally impairs the obligation of private contracts is not invalid for that reason;[44] otherwise it would be possible for private individuals to tie the hands of the government by contracting among themselves. But legislation enacted for the purpose of impairing contract obligations stands on a very different footing. Unless the contract clause of the Constitution is to be swallowed up in the capacious and ever-expanding maw of the police power, such legislation cannot be upheld. It is submitted that the distinction to be drawn is between an incidental impairment through the operation of a general law valid under the police power, and a direct attack on the contract itself. Tested by this criterion, the New York housing laws, so far as they operate to deprive landlords of all power to enforce covenants to quit in leases made prior to the enactment of the laws, are unconstitutional.

EFFECT OF COVENANT OF WARRANTY UPON THE DESTRUCTIBILITY OF CONTINGENT REMAINDERS BY MERGER. — The ease with which contingent remainders could be destroyed at common law, and the grantor's intent thereby defeated, has led England and many states in this country

authorized the defendant to build a dam across the creek to drain certain swampy lands, requiring that he pay compensation to anyone injured by the building of the dam. Plaintiff sought an injunction against the building of the dam. *Held*, that the injunction be denied. It will be noted that the dam was to be built for a public purpose and that the act authorizing it required the payment of compensation for all damages resulting from its construction. The case seems to have been in substance one of the exercise of the power of eminent domain to extinguish the plaintiff's contract right. That this may be done is clear. West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507 (1848).

[40] *Cf.* Stone *v.* Mississippi, 101 U. S. 814 (1880); Douglas *v.* Kentucky, 168 U. S. 488 (1897); Atlantic Transportation Co. *v.* Goldsboro, *supra*.

[41] *Cf.* Chicago Ry. *v.* Nebraska, 170 U. S. 57 (1898); Lousiville Ry. *v.* Mottley, 219 U. S. 467 (1910); Texas Ry. *v.* Miller, 221 U. S. 408 (1911); Union Dry Goods Co. *v.* Georgia Public Service Co., 248 U. S. 372 (1919); Producers' Transportation Co. *v.* Railroad Commission, 251 U. S. 228 (1920).

[42] See Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 629 (1819); Boyd *v.* Alabama, 94 U. S. 645, 650 (1876); Stone *v.* Mississippi, *supra*, 817.

[43] See 32 HARV. L. REV. 74; 33 *id.*, 97.

[44] See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 833. See also Beer Co. *v.* Massachusetts, 97 U. S. 25, 32 (1877); Manigault *v.* Springs, *supra*, 480.